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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DENISE SMITH et al.,	
Plaintiffs and Appellants,	G040976
v.	(Super. Ct. No. 06CC11990)
KAREN FREUND et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Geoffrey Glass, Judge. Reversed.

Law offices of Barrry Novack, Barry B. Novack and Jonathan Parrott for Plaintiffs and Appellants.

Inglis, Ledbetter & Gower, Richard S. Gower, and Gregory J. Bramlage for Defendants and Respondents.

* * *

Alleging negligent supervision, plaintiffs Denise Smith and her son, Brandon Smith, sued defendants Karen and Dennis Freund for wrongful death after defendants' son shot and killed two members of plaintiffs' immediate family.[1] Brandon also sued defendants for negligent infliction of emotional distress.

Defendants moved for summary judgment. Plaintiffs opposed defendants' summary judgment motion and also requested a continuance to permit the parties to complete their discovery. (Code Civ. Proc., § 437c, subdivision (h) (section 437c(h)).) The court denied plaintiffs' section 437c(h) request, granted defendants' summary judgment motion, and entered judgment. As we shall discuss, the court abused its discretion by denying plaintiffs' section 437c(h) request. Accordingly, we reverse.

FACTS

Underlying Facts

In this tragic case, William Freund, defendants' only child, suffered from "Asperger's Syndrome, a condition that negatively affects the sufferer's ability to recognize social cues." Brandon befriended William and was his "'protector' during much of middle school . . . when other kids picked on him." To Brandon, William "never seemed like the violent type."

When William was a high school freshman, Karen told Dr. Christian Bellardi that her son had "behavior problems at home, hitting her, et cetera." Dr. Bellardi "referred [William] immediately to" Dr. Michael Elliott, a psychologist. Defendants took William to see Dr. Elliott, and later to a psychiatrist, Dr. Laurence Greenberg. Dr. Greenberg prescribed William several medications. The psychiatrist informed

[1] For convenience we refer to the Smiths and the Freunds individually by their first names. We mean no disrespect.

defendants and William that one medication, Effexor, had a one in a million or zillion chance of causing "'bad thoughts,' i.e. thoughts of hurting oneself . . . ."

In April 2005, William turned 19 years old. He was a high school graduate, attended ITT Tech College, and lived with defendants. Defendants claimed William as a dependent on their 2005 tax return and paid for his food, shelter, health insurance, and other medical costs.

On October 25, 2005, unbeknownst to defendants, William bought and took delivery of a shotgun. Defendants were never alerted (and did not know) that William had posted messages on the WrongPlanet.net website stating "he had a weapon, that he was going to harm others, and that the events were going to take place on or around October 31, 2005."

Around October 22, 2005, Brandon was driving home, saw defendants and William outside their house, and "stopped to see how they were doing." Defendants "spoke briefly, saying that [William] was acting a little weird."

On October 29, 2005, William went to the Smiths' house and shot and killed Brandon's father (Denise's husband) and Brandon's sister (Denise's daughter). William returned home and shot and killed himself.

Plaintiffs sued defendants for wrongful death due to negligent supervision and for Brandon's claim for negligent infliction of emotional distress.

The Summary Judgment Motion and Plaintiffs' Request for a Continuance

Defendants moved for summary judgment, arguing they owed no duty of care to control their adult son. They contended summary judgment should be granted because plaintiffs could not state a negligence cause of action against defendants "as a matter of law because they owed no . . . legal duty of care" and "the familial relationship between [defendants] and their son is of no legal consequence."

As part of their response to defendants' summary judgment motion, and pursuant to section 437c(h), plaintiffs requested a continuance or denial without prejudice of the motion. Plaintiffs' counsel declared that "despite plaintiffs' diligent efforts, an unqualified recommendation from the Discovery Referee, and a Court Order, defendant Laurence Greenberg, M.D., has consistently refused to testify in this case. Dr. Greenberg's testimony . . . is directly relevant to plaintiffs' case against the Freunds. Plaintiffs have also not been able to take the deposition of William Freund's treating psychologist, Michael Elliott, Ph.D . . . ." Plaintiffs believed "the testimony of Drs. Greenberg and Elliott [would] provide further bases on which to oppose [defendants' summary judgment motion] on the issues of standard of care, causation, and other negligent conduct." Plaintiffs wished to learn what the physicians had told defendants about William's medications and "violent behavior." Plaintiffs contended both doctors had refused to be deposed, "citing privilege and privacy objections." Dr. Greenberg had finally agreed to appear, but defendants "objected to the deposition and production of records" "based on medical privileges and privacy rights."

A court-appointed discovery referee had recommended that the court order Dr. Greenberg "to answer *all questions* concerning his care and treatment of William Freund" and that "all objections thereto based upon the lack of a written waiver from [defendants] be overruled." The court signed the order and overruled such objections. Nonetheless, Dr. Greenberg still refused to appear for a deposition.[2]

Plaintiffs also opposed defendants' summary judgment motion on the merits. They argued: William "was an autistic teenager on psychiatric medication living with his parents" at the time of the murders. Defendants "had actual knowledge that

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[2] On appeal, defendants do not challenge the court's order or the referee's recommendation that Dr. Greenberg answer all questions about his care and treatment of William. Plaintiffs' counsel's declaration in support of their request for continuance described a detailed time sequence of their discovery efforts and showed they had been diligent in pursuing Dr. Greenberg's deposition.

William . . . was violent, because he had physically attacked his parents prior to the incident." Defendants "assumed a duty to control their son . . . because they permitted him to live in their home with knowledge that he was violent and was taking medications that could trigger violent side effects." Defendants knew William "had a mental condition and was on medication, and they paid for the treatment and medication." Defendants were told by William's "doctor that the medications had a potential side effect of causing 'bad thoughts,' i.e., suicidal or violent behavior." Defendants knew William "was 'acting weird' approximately a week before the incident and William had posted messages on the Internet indicating that he intended to kill himself and take others with him in a 'Terror Campaign' in the month before the shootings." "While living in his parents[']home as their dependent, William . . . purchased the shotgun and the ammunition that he used to shoot plaintiffs' decedents." Defendants "ignored the signs of their son's disturbed mental state and failed to take any precautions to prevent the incident." Defendants "had the ability to control their son, and they had a corresponding duty to control their son." Defendants' "failure to control their son was a proximate cause of plaintiffs' harm."

The Court's Ruling

At the hearing on defendants' summary judgment motion, the court asked plaintiffs' counsel, "What possible evidence are those depositions going to give you as to the existence of a legal duty?" Plaintiffs' counsel postulated that defendants might have agreed to take actions "for or on behalf of a psychiatrist or a psychologist," such as undertaking to monitor William's medication use "with an understanding that if he did not take his medication or he took the wrong mixture of medication that could cause problems . . . ." In addition, the doctors might have "communicated to the parents things that they should watch out for," such as behavior changes exhibited by William upon using new medications, and might have instructed the parents to report "back to the

psychiatrist or psychologist any changes." The psychiatrist might have been aware that William was contemplating suicide or "kill[ing] somebody" or of his website postings, and "passed that information along to the parents." The doctors might have told the parents that William "needs to be institutionalized now or he needs to be under observation in a hospital or we have to monitor him more closely." Plaintiffs' counsel stated he had "been precluded from exploring that area" and requested "the opportunity . . . to do that discovery."

By minute order, the court denied plaintiffs' request for a continuance and granted summary judgment for defendants. The minute order stated: "The Court considered whether the parents had a duty to neighbors regarding the supervision of their nineteen year old son, William Freund, with [Asperger's] Syndrome who shot and killed the two neighbors and then killed himself. The First Amended Complaint alleges that Karen and Dennis Freund knew their son had a mental disorder that disposed him to violence and should have warned the Plaintiffs and their decedents about his violent nature. [¶] The Court considered the uncontested facts and the following factors, including: the foreseeability of harm to the Plaintiff, the degree of certainty that the Plaintiff suffered injury, the closeness of the connection between the Defendant's conduct and the injury suffered, the moral blame attached to the Defendant's conduct, the policy of preventing future harm, the extent of the burden to the Defendant, the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and, the availabilily, cost, and prevalence of insurance for the risk involved. [¶] The Court also considered whether there was a special relationship between the moving parties and their adult son that would require them to control William's conduct. The Motion for Summary Judgment meets the prima facie showing that the parents did not have any special knowledge or relationship that would have given rise to a duty. William Freund was an adult, never expressed hostility toward the Plaintiffs or their decedents, and his parents did not know that William Freund had purchased a shotgun and stored it at their

house. William was not only an adult in years but also in maturity; he had graduated from high school and was enrolled in technical college. His parents took him in for counseling because he had a hard time concentrating at school. No one had advised his parents that someone with [Asperger's] Syndrome may get violent, or that his medications would generate homicidal propensities. William's healthcare providers never mentioned that he was a threat to himself or others or that he needed close supervision, William had not displayed any signs of violence to his parents and they were not aware of threats on the Internet, and his parents did not know about the shotgun purchase or William's intentions. [¶] The burden then shifts to the Plaintiffs to show a question of fact. Plaintiff requested a continuance to depose Dr. Greenberg and Dr. Elliott, who were the psychiatrist and psychologist treating William. The Plaintiffs hoped to find that the parents were told of the violent tendencies of William and therefore were on notice. This request is denied because the issue of duty would not depend on what the treating [physicians] told the parents, even if he had warned them about William's possible violence. [¶] Beyond the request for a continuance, the [Plaintiffs] opposed the motion on the merits. Among other arguments, Plaintiff argues that William was autistic and, combined with his psychiatric problems, made him less than independent at age 19 and a ward of his parents. The undisputed facts do not support such a conclusion. There is no support for the argument that William was so dependent on his parents that they owed a duty to third parties about unforeseeable events."

DISCUSSION

Contentions on Appeal

On appeal plaintiffs contend: (1) "There is no per se rule that a parent is never legally responsible for the conduct of an adult child." (2) "The special relationship between [defendants] and their son imposed a duty on [defendants], and [defendants] did

not discharge that duty reasonably." (3) Plaintiffs "have been prevented from obtaining evidence and then had judgment entered against them because they were prevented from obtaining the evidence." This last contention — i.e. that plaintiffs were foreclosed from obtaining evidence necessary to oppose defendants' summary judgment motion — is, in plaintiffs' view, "the real issue in this appeal." They argue the court's denial of their section 437c(h) request precludes a proper evaluation of defendants' legal duty "because the facts of [defendants'] relationship with their son are not fully known." They also assert the court, by denying them a continuance, prevented them from obtaining the necessary foundation for the admission of critical evidence, including a pediatric neurologist's report in 2001 that William experienced rages "and because [defendants'] home life had 'evolved into a frightening situation for the parents,' [the neurologist] suggested that William [might] have to be 'placed outside of the home.'"

Defendants reply there is no possibility "that 'facts essential to the opposition' . . . exist" here. They point to evidence showing they (defendants) knew of William's violent outbursts at age 15 and "that some of the medications being prescribed to William might lead to 'bad thoughts,' which they understood to mean suicidal thoughts." They conclude there is nothing more that "Dr. Greenberg could have told them that they did not allegedly already know that would have created a duty on their part to monitor and control their adult son."

The Court Abused Its Discretion in Denying Plaintiffs' Requested Continuance

A court's ruling on a section 437c(h) request for a continuance is reviewed for abuse of discretion. (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633-634 (*Frazee*).) Section 437c(h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a

continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

"Subdivision (h) was added to section 437c . . . '[t]o mitigate summary judgment's harshness,' and it *mandates* a continuance for the nonmoving party '"'upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion.'"'" (*Frazee*, *supra*, 95 Cal.App.4th at p. 634, italics added.) A continuance of a summary judgment motion is mandatory when the "party seeking the continuance . . . justif[ies] the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented." (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) "[T]he affiant is not required to show that essential evidence does exist, but only that it may exist. This . . . 'leaves little room for doubt that such continuances are to be liberally granted.'" (*Frazee, supra,* 95 Cal.App.4th at p. 634.) "[T]he interests at stake are too high to sanction the denial of a continuance without good reason. '[T]echnical compliance with the procedures of Code of Civil Procedure section 437c is required to ensure there is no infringement of a litigant's hallowed right to have a dispute settled by a jury of his or her peers.'" (*Ibid.*)

The issue presented here is whether "facts essential to justify opposition may exist." (§ 437(c)(h).) Could plaintiffs have gleaned any facts from the doctors that would have enabled them to state a cause of action and oppose defendants' summary judgment motion? Or, conversely, did defendants have no duty, as a matter of law, to supervise or control their son because he was 19 years old at the time he killed the Smith victims?

Accordingly, before we can decide whether the court abused its discretion by denying plaintiffs a continuance, we must examine the court's conclusion that defendants owed plaintiffs no legal duty (irrespective of any communications they had with William's doctors) and were therefore entitled to summary judgment. Our review of the court's summary judgment ruling is de novo. (*Merrill v. Navegar, Inc.* (2001) 26

Cal.4th 465, 476.) We strictly construe the evidence of defendants (the moving parties) and liberally construe that of plaintiffs (the opposing parties), and resolve in plaintiffs' favor "any doubts as to the propriety of granting the motion . . . ." (*Robert T. Miner, M.D., Inc. v. Tustin Ave. Investors* (2004) 116 Cal.App.4th 264, 270.)

An essential element of a negligence cause of action is the defendant's legal duty to protect the plaintiff from harm. (*Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1012-1013 (*Wise*).) "The determination whether in a specific case the defendant will be held liable to a third person *not in privity* is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650, italics added (*Biakanja*).) Of these factors, "the most important [is] foreseeability of harm." (*Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, 211 (*Pamela*).)

"In general, one owes no duty to control the conduct of a third person to prevent him from causing physical harm to another, absent a special relationship between the defendant and either the person whose conduct needs to be controlled or the foreseeable victim of that conduct. [Citations.] [¶] The first category, special relationships between the defendant and the person whose conduct needs to be controlled, includes the relationships between parent and child . . . . In all of the above relationships, the *ability* to control the third party is essential. '"[T]he absence of such ability is fatal to a claim of legal responsibility" . . . . Where . . . the natural relationship between the parties . . . creates no inference of an ability to control, the actual custodial ability must affirmatively appear.'" (*Wise, supra,* 222 Cal.App.3d at pp. 1013-1014.) In addition, a defendant may bear a duty where he or she, "through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from

the third person. In such cases the question of duty is governed by the standards of ordinary care." (*Pamela*, *supra*, 112 Cal.App.3d at p. 209.)

Defendants cite no authority for the proposition that parents can *never* be liable for the torts of their adult children. Parents are *statutorily* liable (up to $25,000) for the injurious and *willful* misconduct of their *minor* children. (Civ. Code, § 1714.1, subd. (a).) But when the issue arises of a parent's liability for a harmful act of his or her adult child, courts apply the duty analysis established in *Biakanja* and *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113. (*Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 645-646 [no special relationship where plaintiffs did not allege mother "had an *ability to control*" adult married son who did not live with her]; *Todd v. Dow* (1993) 19 Cal.App.4th 253, 256, 258-259 [parents had no ability to control adult married son who did not live with them]; *Silberstein v. Cordie* (Minn.Ct.App. 1991) 474 N.W.2d 850, 856 [parents had duty to control 17-year-old adult son who lived with them, was delusional and like a child, and refused to take medication].)

Here, the court, in its minute order granting summary judgment, expressly considered these factors. The minute order is replete with the court's findings about what defendants knew or did not know, *even though William's doctors had not been deposed on the subject, and despite Greenberg's continued resistance to the court's earlier order overruling objections to the taking of his deposition*. Had contrary evidence been learned from William's doctors, the court hypothetically might have revised its minute order as follows: "William expressed hostility toward the Plaintiffs and their decedents. His parents took him in for counseling because they were concerned about his violent outbursts and rages. His doctors advised his parents that someone with Asperger's Syndrome may get violent and that his medications would generate homicidal propensities. William's healthcare providers mentioned that he was a threat to himself or others and that he needed close supervision. William displayed signs of violence to his parents. His parents knew about William's intentions."

In short, we cannot say that, regardless of *anything* plaintiffs could have learned by deposing William's doctors, defendants would still have no duty to supervise William. The court abused its discretion by denying plaintiffs' section 437c(h) request for a continuance or denial without prejudice of defendants' summary judgment motion, particularly in view of Greenberg's continued resistance to the court's order regarding the requested deposition.

DISPOSITION

The judgment is reversed and the order granting summary judgment is vacated. On remand the court is instructed to grant plaintiffs a continuance to enable them to depose Dr. Greenberg and Dr. Elliott.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.